No. 15-674

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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA, *et al.*,

Petitioners,

—v.—

STATE OF TEXAS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE MINKWON CENTER FOR COMMUNITY ACTION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

The MinKwon Center for Community Action ("MinKwon Center") is a not-for-profit organization that seeks to meet the needs and concerns of the Korean American, Asian American, and immigrant communities in New York City and surrounding areas. Among the MinKwon Center's activities are representing these communities' needs on the federal, state and local levels of government; providing these communities the platform to engage in grassroots organizing and activism; and offering a comprehensive range of free social and legal services to more than 8,000 low-income community members.

The decision below has created serious difficulties for the MinKwon Center's ability to advise and advocate for its immigration clients by creating substantial uncertainty regarding the status of the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program and the expansion of eligibility under the 2012 Deferred Action for Childhood Arrivals ("Expanded DACA") program as well as the scope of the Department of Homeland Security's ("DHS") prosecutorial discretion

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person other than the MinKwon Center and their counsel made a financial contribution for the preparation or submission of this brief. Supreme Court Rule 37(2)(a)'s notice requirement is satisfied because this brief is being submitted more than 10 days prior to the deadline for *amicus* briefs in support of petitioners. All parties have consented to the filing of this brief.

more broadly. The MinKwon Center therefore supports this Court's immediate review and reversal of the decision below.[2]

SUMMARY OF ARGUMENT

This case concerns the lives of millions of "'hard-working people who have become integrated members of American society[.]'" Pet. at 9 (quoting App. 415a). The injunction below has real and immediate human consequences. By impeding the implementation of DAPA, it deprives over 4 million parents of the benefits of an entirely proper exercise of Executive discretion. And by blocking the expansion of DACA—an existing, unchallenged Executive Action from which hundreds of thousands of immigrants brought here as children have already benefitted—the decision below simultaneously prevents many deserving immigrants who came to the U.S. as children from qualifying for relief and creates grave uncertainty for current DACA recipients. More broadly, it would potentially throw immigration policy and practice into disarray by massively expanding the ability of non-federal officials and the federal judiciary to interfere with decisions committed by Congress to the Executive's

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[2] *See* MinKwon Center, Press Release, *MinKwon Center and Advocates Call on Supreme Court to Remove Legal Barrier on President Obama's Executive Actions on Administrative Relief* (Nov. 20, 2015), *available at* http://minkwon.org/newsroom/press-releases/minkwon-center-and-advocates-call-on-supreme-court-to-remove-legal-barrier-on-president-obamas-exec.

discretion. In light of the dramatic consequences of the injunction and the plainness of the Fifth Circuit's error in upholding it, the MinKwon Center urges this Court to expeditiously review and reverse the judgment below.

Imagine an immigrant mother of two U.S. citizens, Mrs. K. Her children are 10 and 12, have lived in the United States their entire lives, and have little or no practical experience with life in Mrs. K.'s native Korea. Mrs. K. and her husband, also a Korean immigrant, work hard to provide for their children. But because neither of them has lawful immigration status, they are relegated to low-paying, off-the-books jobs and enjoy virtually none of the legal protections most Americans take for granted.

The MinKwon Center can attest that Mrs. K.'s hypothetical predicament is played out in millions of real lives across the country. The reality of these immigrants' presence in the U.S. raises an important policy question: how should U.S. authorities enforce the immigration laws in light of their limited enforcement resources as well as the humanitarian toll exacted by either 1) mass deportation of millions of parents of U.S. citizens and lawful permanent residents as well as people who came here as children or 2) leaving those same immigrants at the mercy of potentially "unscrupulous" employers? *See ibid.* at 6. Congress, through various provisions of the Immigration and Nationality Act ("INA"), has

committed the resolution of that question to the Secretary of Homeland Security's discretion.[3]

The Expanded DACA and DAPA policies reflect the Secretary's sensible determination that many people who fall into the applicable categories are "'extremely unlikely to be deported given * * * limited enforcement resources'" and should be allowed to petition for deferred action. *Ibid.* at 9 (quoting App. 415a). These policies are a logical extension of the Secretary's original DACA program as part of a broader recognition that certain categories of immigrants who lack lawful status should be granted deferred action on both practical and humanitarian grounds.[4]

Advocates like the MinKwon Center and other immigrant service organizations (as well as their clients) benefit from the Secretary setting clear standards for DHS's exercise of prosecutorial discretion. Where advocates know in advance that DHS attorneys will be considering a specific set of factors in making prosecutorial decisions, they can offer their clients more realistic advice and tailor their arguments to DHS officials appropriately. Policies like DACA and DAPA likewise serve important humanitarian ends by giving immigrants

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[3] *See* 6 U.S.C. § 202(5); 8 U.S.C. § 1103(a)(1)-(3); 8 U.S.C. § 1324a(h)(3). *See generally Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

[4] Both the DACA and DAPA programs are described in more detail in the petition for *certiorari*. *See* Pet. at 7-10.

with close ties to this country the opportunity to live and work openly and under the protection of the laws.

Through a legally unjustified extension of judicial power, the decision below has needlessly injected confusion into the exercise of prosecutorial discretion by DHS. By precluding the expansion of the DACA policy and the implementation of the DAPA policy, the Fifth Circuit has left advocates to guess what factors DHS attorneys may properly consider in granting deferred action and created uncertainty for millions of immigrants regarding whether they can safely come forward, submit to background checks, and seek authorization to pursue lawful work to support their families. And by casting doubt on the legality of the original DACA policy, it creates similar uncertainty for hundreds of thousands of people who came to the U.S. as children and thought they had validly secured deferred action from DHS.

These consequences perfectly illustrates how "[m]uch more than legal niceties are at stake" in matters of standing and related doctrines. *See Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 101 (1998). The Fifth Circuit's grant of standing to state authorities based on Texas's entirely voluntary benefit scheme for certain immigrants and creation of what amounts to a judge-made citizen suit provision for immigration matters imposes immediate burdens on the beneficiaries of DACA and DAPA. It also opens up nearly limitless possibilities

for state and local authorities to interfere with immigration decisions. What if state authorities decide that some category of immigrants should not be granted asylum? What if local officials decide DHS has been too slow to remove a particular immigrant? Under the Fifth Circuit's rulings, they may well have justiciable claims, and attorneys representing aliens in immigration matters will now have an entirely new set of decision-makers to persuade. Neither Article III of the U.S. Constitution nor the Administrative Procedures Act ("APA") should be construed to allow such an insertion of the federal judiciary (as well as non-federal officials) into discretionary enforcement decisions. *See ibid.* ("The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers[.]").

The Fifth Circuit's errors could well play havoc with the immigration system and do immense harm to millions of hard-working people who desire nothing more than to provide for their families. This Court should therefore grant the petition for a writ of *certiorari* and summarily reverse the decision below, or at a minimum set the case for an expeditious hearing on the merits.

ARGUMENT

I. THE DECISION BELOW, IF ALLOWED TO STAND, WOULD CREATE MASSIVE CONFUSION REGARDING THE SCOPE OF THE EXECUTIVE'S LAWFUL DISCRETION AND NEEDLESS COMPLICATIONS FOR IMMIGRATION LAW PRACTICE

A. Immigration advocates frequently appeal to DHS's prosecutorial discretion to achieve deferral of removal for persons who may lack lawful status, but the decision below threatens to sow confusion over how that discretion may be exercised

The MinKwon Center and other organizations have frequently advocated for appropriate use of prosecutorial discretion in immigration matters, both for groups of immigrants and in individual cases. The availability of prosecutorial discretion is especially important to the community that the MinKwon Center serves, for Asians make up the largest share of recent immigrants.[5] There are approximately 1.5 million undocumented immigrants of Asian descent living in the United States, and nearly one out of three of those immigrants could benefit from the Expanded DACA and DAPA policies.[6]

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[5] Pew Research Center, *The Rise of Asian Americans*, (updated April 4, 2013), *available at* http://www.pewsocialtrends.org/2012/06/19/the-rise-of-asian-americans/.

[6] Sanam Malik, *Asian Immigrants in the United States Today*, CENTER FOR AMERICAN PROGRESS (May 21, 2015), *available at* https://www.americanprogress.org/issues/immigration/news/2015/05/21/113690/asian-immigrants-in-the-unites-states-today/.

This Court has eloquently summarized the importance of prosecutorial discretion in the immigration context: "Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities." *Arizona*, 132 S. Ct. at 2499. Immigrant representatives thus routinely (and properly) appeal to these "immediate human concerns" as well as broader "international relations" policies in advocating for their clients before immigration authorities.

Prosecutorial discretion works best when both advocates and front-line DHS officials have clear standards to structure the discussion. That is what the DACA and DAPA policies provide. In those policies, the Secretary established defined criteria the front-line officials should consider in connection with requests for deferred action from immigrants

with certain backgrounds (immigrants who came to the country as children for DACA; parents of U.S. citizens or lawful permanent residents for DAPA). *See, e.g.*, Pet. at 9 (listing DAPA criteria) (citing App. 417a). Such clear policy statements enable efficient assessment by front-line officials (as well as immigrants' representatives) of claims for deferred action.

The original DACA program, which has been in successful operation for over three years and has never been challenged, illustrates the role prosecutorial discretion policies can play in the lives of the individual clients that immigration advocates like the MinKwon Center serve. The MinKwon Center alone has successfully filed over 400 DACA initial applications and over 200 DACA renewal applications. Practically speaking, this means over 400 Asian American youth in New York City can work legally and live free from the fear of removal. And this is just a fraction of the over 52,000 successful DACA applications filed in New York State alone to date. [7] Now, however, DACA beneficiaries must worry that, by virtue of the Fifth Circuit's reasoning, a lawsuit could eliminate their deferred action and throw their lives into chaos.

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[7] U.S. Citizenship and Immigration Services, *Number of I-812D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2015 (June 30)* (Aug. 28, 2015), *available at* http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr3.pdf.

The MinKwon Center and other organizations that provide legal services to immigrants welcomed the President's announcement of the Expanded DACA and DAPA policies in 2014 and had prepared to assist numerous eligible clients like those described above to secure the ability to lead more open lives and escape exploitative employers.[8] But now, the lower courts' injunction against the Expanded DACA and DAPA policies both blocks immigrants from the benefits they could have obtained from those policies and threatens the exercise of prosecutorial discretion more broadly.

Parents of U.S. citizens and lawful permanent residents who might otherwise have come forward to submit to a background check and secure lawful work authorization now must continue to languish in off-the-books employment and live without access to many government services. For example, MinKwon Center client "Mrs. L," the mother of a 10 year old United States citizen child, rejoiced when she first heard of DAPA. She has been in the United States for eleven years, and for her children, America is the only home they know. Mrs. L is a college graduate but has only been able to find work at nail salons because she cannot work lawfully. Learning of DAPA, Mrs. L finally thought she may live free of the constant fear that her home or workplace may be

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[8] *See* New York Immigration Coalition, Press Release, *Immigrant Rights Groups Gear Up to Implement Immigration Executive Order, Despite Court Challenge* (Apr. 17, 2015), *available at* http://www.thenyic.org/ PR/AdminRelief_4.17.15.

raided. But the injunction below has dashed her hopes.

Similarly, MinKwon Center can attest that numerous childhood arrivals who were excluded from the original DACA policy due to the age and arrival date cutoffs would have benefited from the economic and personal security offered by the Expanded DACA policy. One of the MinKwon Center's clients, Jong-Min You, is a 35 year-old man who came to the United States from Korea as an infant in 1981. Because of his undocumented status, the only jobs he could get were in grocery stores and at construction sites despite the fact that he had graduated from college *magna cum laude*. But Jong-Min held out hope that someday the law might change. When President Obama announced the original DACA, and he realized he missed the age cut off by just a year, Jong-Min felt crushed. Last year's announcement of the Expanded DACA policy was a ray of hope, for with that program Jong-Min would finally be able to pursue his new dream of going to law school. Yet again, his dreams have been put on hold.

Brothers "Jake" and "John," also MinKwon Center clients, came to the United States as young children just a few days after the June 15, 2007 cutoff date of arrival for original DACA. As children, Jake and John both dreamed of attending college. When they found out about their undocumented status as teenagers, they were devastated. Because of their undocumented status, Jake and John are

placed in a double bind. They are unable to obtain any loan or assistance for their tuition payments, but they also cannot find secure jobs to save for tuition because of their statuses. In fact, Jake has been exploited many times at part-time jobs but has felt powerless to stand up for himself because of his immigration status. When the Expanded DACA program was announced, Jake and John were ecstatic and immediately began gathering application documents. With the injunction below, however, Jake and John are back to feeling the same uncertainty and insecurity they have been feeling since they were teenagers.

The decision below has also resulted in confusion for immigration law practitioners. Front-line DHS officials must face a legal landscape where they cannot follow the Secretary's directions for how to make prosecutorial discretion decisions. Immigrants' representatives and legal advisors can no longer give clients who would be eligible for deferred action under the DAPA or Expanded DACA policies a clear answer to the question, "Can I petition for deferred action?" And it is anybody's guess what standards may or may not be applied to any given request for prosecutorial discretion going forward.

In the end, the Fifth Circuit's affirmance of the district court's preliminary injunction inflicts tremendous harm on millions of immigrants, from those who would be eligible for deferred action under

DAPA and Expanded DACA to those whose original DACA approvals are threatened. This Court's review and reversal of the judgment below is urgently needed to undo the confusion created by the Fifth Circuit's rulings and enable eligible immigrants to take advantage of this important opportunity to better their lives.

B. The legal errors in the decision below, if not corrected, would seriously complicate immigration advocacy

As the petition for *certiorari* thoroughly explains, the Fifth Circuit majority's grant of standing and interpretation of the APA flout this Court's precedents. This Court has unambiguously held that "'the removal process is entrusted to the discretion of the Federal Government'" and that other parties "'have no judicially cognizable interest in procuring enforcement of the immigration laws[.]'" *See* Pet. at 14 (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 897 (1984) and *Arizona*, 132 S. Ct. at 2506). It is similarly black-letter law that "a State's choice to extend a subsidy on the basis of another sovereign's actions is not a proper basis for standing when the other sovereign's policies change and thus increase the cost of the subsidy." *Ibid.* at 16 (citing *Pennsylvania v. New Jersey*, 426 U.S. 660 (1976)). The Fifth Circuit majority thus plainly erred in allowing Texas to claim standing based on its voluntary decision to extend subsidies for driver's licenses to immigrants with deferred action status.

The Fifth Circuit's APA holdings fare no better. The consequences for voluntary subsidy programs by "third-party States" "fall[ ] far outside the zone of interests of the INA's removal provisions," and the Expanded DACA and DAPA policies are unquestionably matters of Executive discretion unreviewable under the APA. *Ibid.* at 18-23. *See generally Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999). Even if they were reviewable under the APA, the Secretary's broad enforcement discretion under the INA would block any claim that the Secretary lacked authority to adopt these policies, and the Secretary's announcement of the policies is precisely the sort of general policy statement that the APA expressly does not require the agency to subject to notice-and-comment procedures. Pet. at 24-32.

Allowing the Fifth Circuit's errors to go uncorrected would have damaging consequences for immigration advocacy and decision-making. Most starkly, the Fifth Circuit's extension of Article III standing to a state whose sole injury arises from a voluntary subsidy decision dramatically expands the role of non-federal officials in immigration policy. If a state may challenge the decision to extend deferred action to people brought to the U.S. as children or parents of U.S. citizens and lawful permanent residents meeting certain criteria, what principled basis would there be to preclude states from seeking judicial review of other class-based decisions like the

extension of Temporary Protected Status to foreign nationals whose home countries have faced disasters?[9] And why would it be limited to class-based decisions? If an immigrant who may be entitled to a state benefit receives asylum or cancellation of removal, what bar would there be to state officials challenging that decision?

This type of expansion of state standing would add major complications to the representation of immigrants before federal authorities. Advocates pursuing class-based remedies would need to account for possible state interference. Even if they successfully persuaded the Secretary to adopt a policy, they would always have to advise their clients that the benefits of the policy could be delayed by a hostile state government finding the right federal district judge. And given the hostility some state and local officials have expressed to immigration generally, advocates may even face state challenges to individual relief determinations. Such a change in the system would make the already challenging job of securing immigrants' legal rights nearly unmanageable.

Subjecting every immigration policy decision to APA scrutiny and the notice-and-comment process would also create new and unnecessary complications for immigration advocacy. Congress

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[9] *See, e.g.*, DHS, *Designation of Nepal for Temporary Protected Status*, 80 Fed. Reg. 36346, 36346-36350 (June 24, 2015).

has committed numerous immigration law decisions to the Executive's discretion. *See Arizona*, 132 S. Ct. at 2499 ("A principal feature of the removal system is the broad discretion exercised by immigration officials."). Just as the Fifth Circuit's "ruling threatens to deprive agencies throughout the government of the flexibility that is essential in fashioning and revising policies for enforcement and other discretionary practices" (Pet. at 13), so too does it threaten to deprive advocates of the ability to rely on petitioning the Executive officials charged with making such discretionary decisions to achieve policies that improve immigrants lives. Faced with the prospect of cumbersome rulemaking processes and intrusive judicial review, Executive officials may be unwilling to exercise their discretion in these important areas despite the fact that the immigration system is structured to give the Executive "tremendous authority" over the administration of the immigration laws. *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463 (2009).

The consequences of the Fifth Circuit's legal errors go well beyond the specific Expanded DACA and DAPA policies at issue in this case and would work a dramatic shift in national immigration policy and practice. Such a change, which necessarily applies nation-wide given the scope of the Fifth Circuit's claimed injunctive authority, should not be

adopted at all, and certainly should not be adopted without review by this Court.

II. THIS COURT'S REVIEW IS URGENTLY NEEDED TO ELIMINATE THE UNCERTAINTY CREATED BY THE DECISION BELOW

Despite having agreed to expedite the case, the Fifth Circuit majority delayed releasing its decision for months. In fact, the dissenting judge below noted that the majority's "mistake has been exacerbated by the extended delay that has occurred in deciding this 'expedited' appeal," stating "[t]here is no justification for that delay." *Texas v. United States*, No. 15-40238, Slip op. at 124 (5th Cir. Nov. 9, 2015) (King, J., dissenting).

Each day of delay in implementing the Expanded DACA and DAPA policies causes serious harm to millions of immigrants who could benefit from the policy. It represents another day of living on the periphery of American society, another day without any lawful employment opportunities, another day of uncertainty about the future. This Court should not perpetuate this harm by allowing further delay in this case.

In the MinKwon Center's view, the Fifth Circuit majority's errors have been thoroughly documented by the dissenting opinions of Judges Higginson and King below, as well as the *certiorari* petition. *See Texas v. United States*, 787 F.3d 733,

769-85 (5th Cir. 2015) (Higginson, J., dissenting); *Texas v. United States*, Slip op. at 71-124 (King, J., dissenting); Pet. at 14-32. Given that the case presents a purely legal dispute about a five-page policy memorandum and the lower court's errors are so manifest, summary reversal may well be in order. *See, e.g.*, *Johnson v. City of Shelby*, 135 S. Ct. 346, 346-47 (2014) (summarily reversing in light of clear legal error by Fifth Circuit). At a minimum, the MinKwon Center urges the Court to set the case for briefing and argument as soon as the Court's calendar will allow.

CONCLUSION

The petition for a writ of *certiorari* should be granted and the judgment of the Court of Appeals should be reversed.

Respectfully Submitted,

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